Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws

Jeffrey A. Parness[*] *& Matthew R. Walker*[**]

I. INTRODUCTION

In an American trial court of general or special subject matter jurisdiction, a civil case typically is commenced by filing with the court a complaint or some other affirmative pleading.[1] Within an initial pleading there should be presented, at least, "a claim for relief"[2] or "a cause of action"[3] by a named party who seeks redress from an adverse party.[4] Initial pleadings, and any subsequent requests for redress within or related to pleadings,[5] usually should be processed and heard so as to secure "just, speedy, and inexpensive" resolution.[6]

Frequently, a civil case is resolved through settlement or trial. To facilitate such resolution, a trial judge possesses authority to schedule settlement or trial preparation conferences. Written civil procedure laws explicitly recognize judicial authority to compel attendance by the attorneys for the parties and, at times, by the parties themselves at settlement conferences, as well as to compel attendance by the attorneys and by unrepresented parties at trial preparation conferences.

While the civil case box described in written civil procedure laws normally references only presented claims and their named parties and

---

* Professor of Law, Northern Illinois University College of Law. B.A., Colby College, J.D., The University of Chicago.

** B.A. Northern Illinois University, J.D., Northern Illinois University (expected 2002).

1. *See, e.g.*, FED. R. CIV. P. 3 (requiring a complaint to be filed); 735 ILL. COMP. STAT. 5/2-602 (1992) (same); MO. R. CIV. P. § 53.01 (requiring a petition to be filed).

2. FED. R. CIV. P. 8(a).

3. 735 ILL. COMP. STAT. 5/2-602 (1992). While the phrase "cause of action" generally is employed with fact pleading, "claim for relief" usually accompanies notice pleading. *See generally Claim or Cause of Action*, 13 F.R.D. 253 (describing the differences and proposing to amend Rule 8(a)(2) to require pleading of "facts constituting a cause of action").

4. *See, e.g.*, FED. R. CIV. P. 8(a)(2)–(3) (requiring "a short and plain statement of the claim" and "a demand for judgment"); 735 ILL. COMP. STAT. 5/2-601, 603(a) (1992) (requiring "a plain and concise statement" of a cause of action wherein "substantial allegations of fact are necessary"); TEX. R. CIV. P. 47(a) (requiring "a short statement of the cause of action sufficient to give fair notice of the claim involved").

5. Later requests may be written, as in amendments to initial pleadings or in third-party pleadings. FED. R. CIV. P. 15(a), 14(a). Unwritten later requests may be made where unpleaded claims are "tried by express or implied consent of the parties." FED. R. CIV. P. 15(b).

6. FED. R. CIV. P. 1.

attorneys, many civil cases also involve unpresented claims (i.e., insurance coverage) and other interests (i.e., contingency fee recovery) far removed from any claims presented in pleadings or elsewhere. Here, nonparties and their attorneys can be quite important to civil case resolution. Unpresented claims and nonparty interests should also be handled with a view toward "just, speedy, and inexpensive" resolution. Efficient disposition here too can be facilitated by pretrial conferences. Yet, written civil procedure laws typically are silent on pretrial conferences directed at unpresented claims and nonparty interests. While undoubtedly there is at least some scheduling authority regarding unpresented and nonparty matters, it often goes unrecognized or unemployed due, in part, to the silence of the written laws.

Written pretrial conference laws for civil cases in both federal and state trial courts should be reformulated to encompass matters beyond presented claims and named parties. Judgments upon settlements or trials often speak to lienholders, insurers, and other nonparties. To secure "just, speedy, and inexpensive" resolution, written laws should reflect better all the matters for which pretrial conferences might be scheduled.

As the written laws are significantly influenced by the Federal Rules of Civil Procedure, we review historically the guidelines on pretrial conferences within the Federal Rules. Then we demonstrate, utilizing the United States Supreme Court decision in *Kokkonen v. Guardian Life Insurance Co. of America*[7] on ancillary jurisdiction and inherent power, how all federal rules have failed to address fully judicial authority on pretrial conferencing and how these failures have led to misunderstandings and troubling precedents. We then explain how *Kokkonen* should be properly understood, which we hope will clarify future analysis. We conclude with suggestions for reformulating all written pretrial conference laws to include matters beyond presented claims and named parties, so as to secure more "just, speedy, and inexpensive" resolution of all civil litigation matters.[8]

7. 511 U.S. 375 (1994).

8. We shall not address when, how and why such broader pretrial conference laws should be used. For such a discussion, see generally Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of* G. Heileman Brewing Co. v. Joseph Oat Corp., 69 WASH. U.L.Q. 1059 (1991).

II. THE FEDERAL RULES OF CIVIL PROCEDURE ON PRETRIAL CONFERENCES

Federal Rule of Civil Procedure 16, effective in 1938, was entitled "Pre-Trial Procedure; Formulating Issues."[9] It made no explicit mention of settlement, though settlement presumably was discussed during many pretrial conferences. As written, the Rule was geared to trial preparation conferences.[10] The Rule allowed the district court to "direct the attorneys for the parties to appear before it for a conference to consider" subjects that would "aid in the disposition of the action," including issue simplification, pleading amendment, avoidance of "unnecessary proof," "limitation" on experts, and referrals of factual issues to masters.[11]

---

9. The text of the 1938 version of Rule 16 is found in *Rules of Civil Procedure for the District Courts of the United States*, 308 U.S. 645, 684 (1938) [hereinafter *1938 Rule*] and reads as follows:

> Rule 16. Pre-Trial Procedure; Formulating Issues.
>
> In any action, the court may at its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

10. *See* Hon. Alfred P. Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 424 (noting that the U.S. Judicial Conference in 1944 approved the Pre-Trial Committee's statement "that settlement is a by-product of good pre-trial procedure rather than a primary objective to be actively pursued by the judge"); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 935–36 (2000) (stating that the 1938 Rule was intended to cover meetings about coming trials).

11. *1938 Rule*, *supra* note 9, 308 U.S. at 684. The 1938 version of the Rule operates today in some American states. ARK. R. CIV. P. 16; GA. CODE ANN. § 9-11-16 (1993); KY. R. CIV. P. 16; MASS. R. CIV. P. 16; MISS. R. CIV. P. 16; MO. R. CIV. P. 62.01; N.C.R. CIV. P. 16; PA. R. CIV. P. 212.3; S.D. CODIFIED LAWS § 15-6-16 (Michie 2001); VT. R. CIV. P. 16; VA. SUP. CT. R. 4:13; WASH. SUPER. CT. CIV. R. 16.

Rule 16 remained unchanged until 1983[12] when it was significantly overhauled.[13] Its title then read "Pretrial Conferences; Scheduling; Management."[14] While the original Rule designated six subjects for possible consideration,[15] the new Rule listed five objectives and eleven subjects.[16] The new Rule contemplated required scheduling and planning conferences early on for many civil cases as well as the prospect of multiple conferences thereafter.[17] Judicial authority was broadened to reach not only attorneys, but also "any unrepresented parties."[18] Discovery, pretrial motion, and settlement matters, as well as trial preparation matters, could now guide pretrial conferences.[19]

The 1983 Rule expressly made "facilitating the settlement of the case" a legitimate objective of a pretrial conference.[20] The "participants" at any conference could "consider and take action" on a variety of subjects, including "the possibility of settlement."[21] There is no language in the 1983 Rule describing all possible participants.[22] The Rule did say that "[a]t least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed."[23]

The Advisory Committee Note to the 1983 Rule, prepared by the Advisory Committee on Civil Rules and first submitted to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,[24] found that settlement discussions at pretrial conferences had "become commonplace"[25] and were "appropriate at

12. There was a proposal in 1955 to broaden a judge's power in "big case[s]" where "protracted litigation" was expected. 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 16 App.02[1] (3d ed. 2001).

13. *Federal Rules of Civil Procedure*, 97 F.R.D. 165, 201–05 (1983) [hereinafter *1983 Rule*]. This version of the Rule operates today in some American states. ALA. R. CIV. P. 16; MONT. R. CIV. P. 16; N.M.R. CIV. P. DIST. CT. 1-016; UTAH R. CIV. P. 16.

14. *1983 Rule*, *supra* note 13, 97 F.R.D. at 201.

15. *1938 Rule*, *supra* note 9, 308 U.S. at 684.

16. *1983 Rule*, *supra* note 13, 97 F.R.D. at 201–05.

17. *Id.*

18. *Id.* at 201.

19. *Id.* at 207 advisory committee's note.

20. *Id.* at 201; FED. R. CIV. P. 16(a).

21. *1983 Rule*, *supra* note 13, 97 F.R.D. at 202–03; FED. R. CIV. P. 16(c)(7) (1983) (repealed 1993).

22. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 667 (7th Cir. 1989) (en banc) (Manion, J., dissenting) ("Rule 16(c) does not say who those 'participants' may be.").

23. *1983 Rule*, *supra* note 13, 97 F.R.D. at 204.

24. *Id.* at 189 conference committee's report; *see also* 28 U.S.C. § 331 (1994) (creating the Judicial Conference of the United States); 28 U.S.C. § 2073(b) (1994) (creating a standing committee on rules of practice, procedure, and evidence).

25. *1983 Rule*, *supra* note 13, 97 F.R.D. at 210 advisory committee's note.

any time."[26] It further said that a pretrial conference devoted exclusively to settlement "may be desirable" and that "settlement should be facilitated at as early a stage of the litigation as possible."[27]

This Advisory Committee viewed the 1938 Rule as "a success," in part, because it improved and facilitated the "settlement process."[28] Yet, it found the 1938 Rule had become outdated because it did not reflect "the significant changes in federal civil litigation."[29] The Advisory Committee said that "the amendment explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed" and "thus will be a more accurate reflection of actual practice."[30] The Committee did caution, however, that mandating settlement conferences "would be a waste of time in many cases."[31]

Rule 16 was last amended in 1993,[32] with the most recent changes constituting more refinement than overhaul. The Rule now enumerates sixteen subjects "for consideration at pretrial conferences."[33] The new Rule also contemplates a more active role for judges. While in 1983 the "participants" at a pretrial conference would "consider and take action" with respect to the subjects discussed, in 1993 "the court" was to "take appropriate action" regarding the subjects considered.[34]

The 1993 Rule also expressly authorizes judges to "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."[35] The

---

26. *Id.*

27. *Id.*

28. *Id.* at 205–06 advisory committee's note.

29. *Id.* at 206 advisory committee's note.

30. *Id.* at 207 advisory committee's note.

31. *Id.* at 210 advisory committee's note.

32. *See Federal Rules of Civil Procedure*, 146 F.R.D. 401, 597–601 (1993) (showing the changes made to Rule 16) [hereinafter *1993 Rule*]. This version of the Rule operates today in some American states. ALASKA R. CIV. P. 16; HAW. R. CIV. P. 16; KAN. R. CIV. P. 60-216; MINN. R. CIV. P. 16.01–16.06; N.D.R. CIV. P. 16; TENN. R. CIV. P. 16.01–16.06; W. VA. R. CIV. P. 16; WYO. R. CIV. P. 16.

33. *1993 Rule*, *supra* note 32, 146 F.R.D. at 598–601.

34. *Id.* at 598–99. Subdivision (c) under the 1983 Rule read: "(c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to the subjects discussed." *1983 Rule*, *supra* note 13, 97 F.R.D. at 202. The 1993 Rule reads: "(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to the subjects considered." *1993 Rule*, *supra* note 32, 146 F.R.D. at 598–99; FED. R. CIV. P. 16(c).

35. *1993 Rule*, *supra* note 32, 146 F.R.D. at 601; FED. R. CIV. P. 16(c). The Advisory Committee explained that this addition was expressly directed at the settlement provision, stating that "paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c)." *1993 Rule*, *supra* note 32, 146 F.R.D. at 604–05 advisory committee's note. This portion of the amendments to Rule 16 seems contrary to the Advisory Committee notes to the 1983 amendments,

Advisory Committee explained that this change would help "eliminate questions . . . regarding the authority of the court to make appropriate orders . . . to facilitate settlement."[36] The Committee noted that participation by a party or its representative might involve "an officer of a corporate party, a representative from an insurance carrier, or someone else," depending upon the circumstances.[37] The Committee also said that the "explicit authorization to require personal participation" was not meant "to limit the reasonable exercise of the court's inherent powers."[38]

The 1993 Rule received some criticism. There was concern "that explicit authority to require party attendance at settlement conferences would be misused by some judges to coerce settlements."[39] The rulemakers did not proceed with a few suggested changes. Eliminated was a provision explicitly authorizing "mandatory attendance and participation" of interested insurers in alternative dispute resolution procedures.[40] While the rulemakers did not push an amendment expressly authorizing district courts to require "insurers" to attend pretrial conferences,[41] the Committee noted "the strong feelings of many" that authority "to require that parties, or their insurers, attend a settlement conference" was not only "needed," but also "already within the court's inherent powers."[42] Judicial authority over insurers, and perhaps other

---

which state in regard to the last sentence in subsection (c) that "[t]he reference to 'authority' is not intended to insist upon the ability to settle the litigation." *1983 Rule*, *supra* note 13, at 211 advisory committee's note.

36. *1993 Rule*, *supra* note 32, 146 F.R.D. at 603 advisory committee's note.

37. *Id.* at 605 advisory committee's note. The Committee left open who "someone else" might be. *Id.*

38. *Id.* The Committee cites *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc), on inherent powers. *1993 Rule*, *supra* note 32, 146 F.R.D. at 605 advisory committee's note. The Committee warned, however, "that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required." *Id.*

39. Letter from Hon. Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, 146 F.R.D. 519, 526, Attachment B, "Issues and Changes" (May 1, 1992).

40. *Id.* (noting that such mandates may arise under "local experimentation under the Civil Justice Reform Act"). That proposal appears in *Proposed Rules*, 137 F.R.D. 53, 85 (1991).

41. *See Proposed Rules*, *supra* note 40, 137 F.R.D. at 85 ("The court may require that parties, or their representatives and insurers, attend a conference . . . .").

42. *1993 Rule*, *supra* note 32, 146 F.R.D. at 526 advisory committee's note. A detailed history of Rule 16 is found in Resnik, *supra* note 10:

> Throughout the century, some judges and lawyers surely met with each other and talked about settling cases. Settlement was—and is—always on the table . . . . The shift I have traced begins in the 1920s, runs through rulemaking in the 1930s, protracted litigation in the 1950s, and schools for judges in the following decades, and finds current expression in the comments of a federal judge explaining in 1994 to lawyers at a federal bar meeting in Los Angeles that going to trial meant that "the system" had failed.

nonparties, during pretrial conferencing thus remains subject to case precedents.

III. JUDICIAL AUTHORITY UNDER *Kokkonen v. Guardian Life Insurance Co. of America*

Judicial authority during settlement and trial preparation conferences in the federal trial courts, at times extending beyond any written laws, was described in the United States Supreme Court decision in *Kokkonen v. Guardian Life Insurance Co. of America*,[43] rendered a year after Rule 16 was last amended. There, the Court recognized limits on trial court enforcement authority over civil case settlement agreements.[44] Yet the Court in *Kokkonen* went further, inviting pretrial conferences involving, at times, unpresented claims and interests as well as nonparties.[45] Such conferences are exemplified in the *Matsushita*[46] and *Cluett*[47] cases, which follow a review of *Kokkonen*.

A. The Two Heads of Kokkonen

The civil litigation parties in *Kokkonen*, involved in a dispute over an agency relationship concerning insurance sales, orally agreed, on the record before a federal district judge in chambers, to resolve all claims and counterclaims.[48] The parties then executed, and the district judge signed, a stipulation and order dismissing the diversity action.[49] The order did not reserve jurisdiction to enforce the agreement; it did not even mention the agreement.[50] Subsequently, a dispute arose under the agreement when the petitioner failed to return certain files to the insurer.[51] The insurer moved in the same district court to enforce the

---

Id. at 949.

43. 511 U.S. 375 (1994).

44. *Id.* at 381–82.

45. *See id.* (recognizing courts' ability to "embody" the terms of settlement contracts in dismissal orders). Additionally, the court recognized that ancillary jurisdiction includes the authority to compel a lawyer engaged in litigation misconduct to pay an opposing party's attorney's fees. *Id.* at 380 (citing Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991)).

46. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

47. Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251 (2d Cir. 1988).

48. *Kokkonen*, 511 U.S. at 376.

49. *Id.* at 376–77.

50. *Id.* at 377.

51. *Id.*

agreement.[52] The court enforced the agreement under its "inherent power" over the objection that the court lacked subject matter jurisdiction.[53]

The Supreme Court reversed. In assessing the lower court's reference to "inherent power," the Court focused on but one of the "two separate, though sometimes related . . . heads" of ancillary jurisdiction.[54] The Court generally found that "ancillary jurisdiction" had been used

> in the very broad sense . . . for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and, (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.[55]

The Court held that neither purpose "supports the present assertion of jurisdiction."[56] As to "factually interdependent" claims, the Court found, and the parties did not dispute, that the facts relating to the "breach of agency" complaint and to the "breach of settlement agreement [had] nothing to do with each other."[57] As to successful court functioning, seemingly relied on by the insurer seeking enforcement of the settlement,[58] the Court found that if the settlement agreement "had been made part of the order of dismissal," the situation would be "quite different."[59] Then any breach would either violate a specific court order

---

52. *Id.*

53. *Id.*

54. *Id.* at 379–80 (citations omitted).

55. *Id.* (citations omitted). While the *Kokkonen* Court described "ancillary jurisdiction" and "inherent power" as including the parameters of judicial authority to decide claims and related issues arising in civil cases, elsewhere the Court seemingly has recognized other forms of inherent powers. In *Mistretta v. United States*, 488 U.S. 361 (1989), Justice Scalia wrote:

> The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be. Thus, the courts could be given the power to say precisely what constitutes a "restraint of trade," or to adopt rules of procedure, or to prescribe by rule the manner in which their officers shall execute their judgments, because that "lawmaking" was ancillary to their exercise of judicial powers.

Id. at 417 (Scalia, J., dissenting).

56. *Kokkonen*, 511 U.S. at 380.

57. *Id.*

58. *See id.* ("But it is the second head of ancillary jurisdiction, relating to the court's power to protect its proceedings and vindicate its authority, that both courts in the present case appear to have relied upon, judging from their references to 'inherent power.'") (citation omitted).

59. *Id.* at 381.

or fall under a retention of subject matter jurisdiction.[60] The Court concluded, however, that absent such incorporation, "enforcement of the settlement agreement is for state courts."[61]

The Court in *Kokkonen* understood that the types of ancillary and inherent judicial authority it described had been and would continue to be troublesome. It said that "ancillary jurisdiction can hardly be criticized for being overly rigid or precise."[62] Imprecision seemingly results, in part, because inherent and ancillary powers are not wholly derived from "rule or statute but [from] the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[63] While these doctrines encompass broader powers than expressly recognized under written civil procedure laws,[64] these powers often seem "murky."[65]

Recognizing the potential for misunderstanding and abuse, the Supreme Court has urged caution in employing these doctrines. After *Kokkonen*, it has said that inherent and ancillary judicial authority "must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."[66] Yet, the

---

60. *Id.* Judicial enforcement of civil case settlements occasionally is directed by written civil procedure laws. *E.g.*, CAL. CIV. PROC. CODE § 664.6 (West Supp. 2001).

61. *Kokkonen*, 511 U.S. at 382.

62. *Id.* at 379.

63. Link v. Wabash R.R., 370 U.S. 626, 630–31 (1962); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 43–44 (1991) (noting that inherent powers of the federal courts include power to admit to the bar, discipline attorneys who appear before the court, punish for contempt, vacate a judgment on proof of fraud, bar disruptive criminal defendants, dismiss a case on forum non conveniens grounds, and act sua sponte to dismiss a case for failure to prosecute).

64. *See, e.g.*, *Chambers*, 501 U.S. at 47–48 (noting that inherent power can be used, inter alia, to expand sanctioning authority granted by Rule 11 and 28 U.S.C. § 1927).

65. HBE Leasing Corp. v. Frank, 882 F. Supp. 60, 62 (S.D.N.Y. 1995). The *HBE* court is not alone in its confusion:

> Despite historical reliance on inherent powers, including Supreme Court jurisprudence dating back to 1812, the notion of inherent power has been described as nebulous, and its bounds as "shadowy." The conceptual and definitional problems . . . have bedeviled commentators for years . . . . [V]ery few federal cases discuss in detail the topic of inherent powers. More importantly, those cases that have employed inherent power appear to use that generic term to describe several distinguishable court powers. To compound this lack of specificity, courts have relied occasionally on precedents involving one form of power to support the court's use of another.
>
> These observations suggest that it is not always possible to categorize inherent power decisions.

Eash v. Riggins Trucking Inc., 757 F.2d 557, 561–62 (3d Cir. 1985) (en banc) (citations and footnotes omitted).

66. Degen v. United States, 517 U.S. 820, 823 (1996). In *Degen*, the Court describes inherent authority as "power . . . limited by the necessity giving rise to its exercise." *Id.* at 829.

dangers must be faced because such judicial authority "is, at its core, a creature of necessity."[67]

We posit that the doctrines of ancillary and inherent powers are best understood as involving two distinct forms of judicial authority, each capable of operating without express language in written civil procedure laws. One, which we find often is labeled ancillary, pendent, or most recently, supplemental jurisdiction, involves initial judicial authority over disputed civil claims,[68] though all such claims may not be able to be resolved on the merits at a trial should trial become necessary. The other, which we find often is labeled inherent power, involves the determination and implementation of the processes necessary for the resolution of the disputed civil claims in a "just, speedy, and inexpensive" manner.[69] These two forms of judicial authority are illustrated in the following two cases. The first, *Matsushita Electric Industrial Co. v. Epstein*,[70] shows how the first head of *Kokkonen* allows court involvement in settlement talks about factually interdependent claims which could not be brought to trial or otherwise resolved by the same court if no settlement is reached. The other, *Cluett, Peabody & Co. v. CPC Acquisition Co.*,[71] shows how the second head of *Kokkonen* can be employed both to hear and to resolve unpresented civil claims and interests that are not factually interdependent with the disputed civil claims, and that may involve nonparties, so that the court can resolve the disputed civil claims in a fair, efficient, and cost effective manner. We believe that at least some of the confusion over the two forms of judicial authority would dissipate if ancillary jurisdiction was viewed as a form of judicial authority involving initial subject matter jurisdiction over factually interdependent (if not also factually-related) claims, while inherent power was viewed as a form of judicial authority encompassing varying powers necessary for resolving such claims.[72]

---

67. Peacock v. Thomas, 516 U.S. 349, 359 (1996).

68. *See* 28 U.S.C. § 1367 (1994) (prescribing the claims over which the federal district courts have supplemental jurisdiction).

69. FED. R. CIV. P. 1.

70. 516 U.S. 367 (1996).

71. 863 F.2d 251 (2d Cir. 1988).

72. While the term ancillary jurisdiction as used in *Kokkonen* includes many asserted exercises of inherent powers, we employ the term only to cover authority over non-diversity state law claims and interests in some significant way factually related to the civil claims properly pending before federal district courts under independent jurisdictional statutes. Such ancillary authority includes, but is not limited to, supplemental jurisdiction over claims under 28 U.S.C. § 1367. *Cf.* Futura Dev., Inc. v. Estado Libre Asociado, 144 F.3d 7, 9 n.1 (1st Cir. 1998) (utilizing the term "supplemental jurisdiction" to cover federal court authority over related state law claims and the term "enforcement jurisdiction" to cover inherent authority necessary for courts to function successfully, without mentioning nonenforcement proceedings involving vindication and management also necessary for suc-

B. The Matsushita *and* Cluett *Cases*

The dispute in *Matsushita* arose when Matsushita sought a takeover of MCA.[73] A class action was instituted in a Delaware Court of Chancery on behalf of the MCA stockholders alleging that MCA and its board of directors had failed to maximize the value of MCA stock and had failed to disclose a conflict of interest between the managers of MCA and Matsushita.[74] After the Delaware class action was initiated, a second group of plaintiffs filed a related class action in a California federal district court alleging violations of federal Security and Exchange Commission rules.[75]

Before the California federal case was heard, Matsushita offered a settlement involving a dismissal of the Delaware state action and a release of all claims, including the federal claims then pending in the California action.[76] The Delaware court refused to approve the agreement because there was no monetary benefit to the class members.[77] The Delaware judge determined that it would be unfair to release all claims under a settlement that had no monetary value to class members because the federal claims had arguable merit.[78] After the agreement was rejected, the California court declined to certify the class.[79] This decision was then appealed.[80] Before that appeal was heard, however, the Delaware class action was settled, with the agreement including a release of any federal claims.[81]

Individuals within both the Delaware and California classes that had neither opted out of the Delaware class nor appeared at the hearings in Delaware to contest the settlement or class representation then sought

---

cessful court function), *vacated by* U.S.I. Props. Corp. v. M.D. Constr. Co., 230 F.3d 489 (1st Cir. 2000).

73. *See Matsushita*, 516 U.S. at 369–70 (explaining that there was a tender offer that resulted in Matsushita acquiring MCA).

74. *In re* MCA, Inc., 598 A.2d 687, 690 (Del. Ch. 1991). There were also claims involving wasting assets and conspiring to break Delaware law. *Matsushita*, 516 U.S. at 370.

75. *MCA*, 598 A.2d at 690.

76. *Id.* at 690.

77. *Id.* at 696.

78. *Id.* at 695–96. While state judicial consideration of the strength of the federal law claims on the merits may seem to invade the exclusivity of federal court authority, it also seems necessary in order to assure that the settlement was fair to the absent class members.

79. *Matsushita*, 516 U.S. at 370.

80. *Id.*

81. *Id.* at 370–71. The settlement agreement contained an opt-out provision and a $2 million deposit to be distributed to class members. *Id.* at 371.

to proceed further in the California case.[82] The United States Supreme Court had to determine if the Delaware court judgment should be refused full faith and credit by a federal court because it contained a release of federal law claims within exclusive federal court subject matter jurisdiction.[83] The Supreme Court held that deference generally is "applicable in cases in which the state-court judgment . . . incorporates a class-action settlement releasing claims solely within the jurisdiction of the federal courts."[84] Since the agreement would preclude any proceedings in Delaware state courts, the agreement was found by the Supreme Court to be preclusive in the federal courts as well.[85]

In allowing a state court judge to oversee and approve a class settlement containing claims within exclusive federal district court subject matter jurisdiction,[86] the *Matsushita* decision allows the state court to exercise at least some ancillary authority over factually interdependent claims so that it may dispose of all related claims in a single proceeding,[87] though not all claims were suitable for adjudication by a state court trial. State court ancillary authority over certain unpresented federal law claims between named parties is thus appropriate even though the claims could have been neither pleaded nor tried on the merits in the state court.

Inherent authority necessary for the trial court to function successfully was exercised in *Cluett, Peabody & Co. v. CPC Acquisition Co.*[88] There, a fee dispute arose between Paul Bilzerian and the law firm of Latham and Watkins.[89] The fees were incurred by Bilzerian during his attempted takeover of Cluett.[90] The legal services related to the filing of a California federal court lawsuit to enjoin Cluett from resisting a tender

82. *Id.* at 372. Had these individuals opted out of the settlement class or objected to the release of exclusively federal claims in the Delaware state case, they could have proceeded in the California federal case "unimpeded by the Delaware judgment." *Id.* at 385. The court noted that those Delaware plaintiff class members who requested exclusion were still proceeding in federal court. *Id.* Incidentally, a few of these individuals unsuccessfully sought in 1999 to intervene for the purpose of reopening the Delaware court settlement. *In re* MCA, Inc., 774 A.2d 272, 276 (Del. Ch. 2000). The court lamented that its "decision is the latest chapter, probably not the last, in this case." *Id.*

83. *Matsushita*, 516 U.S. at 369.

84. *Id.* at 375.

85. *See id.* at 386 (concluding also that the provision granting exclusive federal jurisdiction does not effect a partial repeal of the general full faith and credit provision).

86. *See id.* at 385–86 (noting that similarly exclusive federal claims have been held to be arbitrable through an arbitration agreement in lieu of trial in federal court).

87. *See In re* MCA, Inc., 598 A.2d 687, 691 (Del. Ch. 1991) (referring to settling the state claims with the federal claims: "As a practical matter, a so-called 'global settlement' is often necessary if any settlement at all will occur.").

88. 863 F.2d 251 (2d Cir. 1988).

89. *Id.* at 252–53.

90. *Id.*

offer by Bilzerian and the defense of a New York federal court lawsuit commenced by Cluett to stop Bilzerian from taking over the company.[91] The fee agreement bound Bilzerian to pay the firm a flat rate for the work of both partners and associates.[92] After the cases settled, Bilzerian refused to pay all the fees sought by the firm, saying he was defrauded because he was charged the flat rate for work done by unlicensed attorneys.[93] Bilzerian filed a declaratory judgment action in a California state court seeking a determination of the disputed legal fees.[94]

Yet, the New York federal court heard the fee dispute. Issues were tried before a jury, which found for Latham and Watkins.[95] On appeal, Bilzerian argued "that the district court abused its discretion in exercising its ancillary jurisdiction over the fee dispute."[96] The Court of Appeals found the trial court properly exercised its inherent power because "the fee dispute was properly related to the main action."[97] Further, in rejecting Bilzerian's argument that only the legal fees tied to the New York lawsuit should have been tried, the appellate court said it "would have been wasteful and duplicative, under the circumstances, to require a bifurcated procedure in which part of the fee dispute would be resolved by a federal court in Manhattan and another part by a state court in Sacramento, California."[98] By allowing all disputes over fees arising from the attempted Cluett takeover to be heard in New York, the appellate court allowed the two trial courts to function successfully.

---

91. *Id.*

92. *Id.* at 252 n.1.

93. *Id.* at 254. The fees incurred were $354,569, but as part of the settlement agreement Bilzerian was given $5 million dollars for fees and expenses incurred during his attempted acquisition. *Id.* at 253–54.

94. *Id.* at 253.

95. *Id.* at 254.

96. *Id.*

97. *Id.* at 256. The trial court exercised judicial authority over the fee dispute based upon four factors: (1) the lower court's familiarity with the subject matter; (2) judicial responsibility to protect court officers; (3) that the convenience of the parties would be equally well served wherever the fee dispute was litigated; and, (4) judicial economy. *Id.* While the *Cluett* court employed the term "ancillary jurisdiction," *id.* at 256, we find the judicial authority used in *Cluett* better placed within the inherent powers recognized in the later *Kokkonen* opinion (as related to successful court functioning) as the fee dispute was not "factually interdependent." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379–80 (1994).

98. *Cluett*, 863 F.2d at 257. Of course, under its reasoning, the appeals court also would have recognized possible inherent authority in the pending California federal case over fee disputes related to work in that case, if not in all merger activities.

IV. JUDICIAL AUTHORITY DURING PRETRIAL CONFERENCES

We find federal judicial authority can extend under *Kokkonen* beyond powers expressly recognized in written civil procedure laws. Outside the civil case box, federal trial judges may preside over pretrial settlement conferences involving civil claims that they cannot try on the merits under *Kokkonen*. And, they may preside over trials of civil claims which are not "factually interdependent" under *Kokkonen*. There was no written Delaware law used in *Matsushita* on trial judges facilitating settlements of civil claims they could not try,[99] and there was no written federal law used in *Cluett* on trial court resolution of related attorney fee disputes. Such judicial authority should be employed with caution, however, even where appropriate, as there is always a "danger of overreaching."[100]

Where written civil procedure laws on pretrial conferences are silent, some trial judges do not recognize—or experience discomfort recognizing, even cautiously—additional judicial authority. While some judges recognize that additional judicial authority may only be exercised "in harmony" with written rules or statutes,[101] there is significant disagreement among the judges on resolving questions of inconsistency. While certain judges are quite comfortable going beyond the literal wording of general pretrial conference laws, finding no inconsistencies, others are quite reluctant and choose to stay close to the literal terms of the written law.[102] Still other judges exercise expansive pretrial

99. DEL. CT. CH. R. 16(a). The Rule, applicable in *Matsushita* and much like the 1938 Rule, expressly notes that attorneys and unrepresented parties may be directed to appear for a pretrial conference to discuss the issues and processes for trial. *Id.*

100. Degen v. United States, 517 U.S. 820, 823 (1996). This danger occurs "when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Id.*

101. *See, e.g.*, Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1988) (acknowledging that a federal district court's "substantial inherent power to control and manage its docket . . . . must, of course, be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure"); *see also* Eash v. Riggins Trucking Inc., 757 F.2d 557, 562 (recognizing that in a "limited domain of judicial autonomy, courts may act notwithstanding contrary legislative direction"). As many state courts are constitutionally established and empowered, unlike the Article III federal courts, some state courts innately possess much broader inherent powers than their federal court counterparts, often in areas involving the regulation of legal practice and contempt. *See, e.g.*, Cripe v. Leiter, 703 N.E.2d 100, 104–07 (Ill. 1998) (reviewing cases on General Assembly constraints on lawyer conduct through consumer protection acts and the like, finding differing state court approaches, and suggesting that in Illinois any such constraints would be an unconstitutional intrusion on the high court's sole authority to regulate and discipline lawyer conduct).

102. Of course, where general pretrial conference laws may be and are supplemented with local court rules, the stretch of the language in the general laws becomes less crucial. *See, e.g.*, S.D. IND.

conferencing authority by significantly stretching written laws to fit. These differing approaches to written civil pretrial conference laws are illustrated in two federal appellate court decisions, each grounded on the 1983 version of Rule 16, the language of which remains today in several state civil procedure laws.[103] The decisions show how many trial judges today may fail to appreciate the types of settlement conferences under *Matsushita* and of trial preparation conferences under *Cluett.*

A. Beyond the Written Laws

In *G. Heileman Brewing Co. v. Joseph Oat Corp.*,[104] the appellate court went beyond the wording of the 1983 version of Rule 16 to facilitate a just, speedy, and inexpensive resolution of a pending civil case. A federal magistrate judge had ordered a Joseph Oat "corporate representative with the authority to settle" to attend a pretrial settlement conference.[105] The only representative from Joseph Oat who appeared was its attorney.[106] The trial court determined the order was violated and imposed sanctions.[107] Joseph Oat contended on appeal that Rule 16 permitted the trial court to order the attendance of only "attorneys for the parties or any unrepresented parties."[108]

Writing for the majority, Judge Kanne found that Rule 16 did not "completely describe and limit the power of federal courts," though the "concept that district courts exercise procedural authority outside the explicit language of the rules of civil procedure is not frequently documented."[109] He reasoned that "the mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition."[110] Written civil procedure laws only "form and shape certain aspects of a court's inherent powers, yet allow the continued exer-

---

LOCAL R. 16.1(h) ("The Court may require the parties or their agents or insurers to [attend] settlement negotiations.").

103. *E.g*, ALA. R. CIV. P. 16; MONT. R. CIV. P. 16; N.M.R. CIV. P. DIST. CT. 1-016; UTAH R. CIV. P. 16.

104. 871 F.2d 648 (7th Cir. 1989) (en banc).

105. *Id.* at 650. Joseph Oat Corp. also raised the argument that they interpreted the order to mean the attendance of an insurance carrier with the authority to settle should be present. *Id.* at 656.

106. *Id.* at 650.

107. *Id.* The sanction involved the related fees of opposing counsel in the amount of $5860.01 "pursuant to" Rule 16(f). *Id.*

108. *Id.*

109. *Id.* at 651.

110. *Id.* at 652.

cise of that power where discretion should be available."[111] Judge Kanne concluded that "Rule 16 is not designed as a device to restrict or limit the authority of the district judge in the conduct of pretrial conferences."[112]

Thus, to Judge Kanne, the breadth of inherent power, "derived from the very nature and existence" of the judicial office, includes the "broad field over which the Federal Rules of Civil Procedure are applied."[113] "Inherent authority remains the means by which district judges deal with circumstances not proscribed or specifically addressed by rule or statute, but which must be addressed to promote the just, speedy, and inexpensive determination of every action."[114] So, to Judge Kanne, written laws do not limit, but in fact are "enhanced by" inherent judicial power.[115]

B. Staying Within the Written Laws

While Judge Kanne found inherent judicial power could and did enhance Rule 16, the dissenting judges in *Heileman* found varying reasons why the use of such power, at least in the pending case, should not be allowed. Some found that any inherent power should not encompass mandated attendance by a represented party or its agent at any pretrial settlement conference.

In dissent, Judge Posner explained that under the written Federal Rule, the "main purpose of the pretrial conference is to get ready for trial."[116] But, a represented party's presence at a pretrial conference would only be sought if deemed necessary to facilitate settlement.[117] Judge Posner then discussed the "dangers [of] too broad an interpretation of the federal courts' inherent power" to promote settlement.[118] One danger involved encouraging "judicial high-handedness ('power corrupts')."[119] Also, because people hire attorneys to "economize on their own investment of time in resolving disputes," there is a danger in overriding their judgment as judges may "ignore the value of other people's time" in their zeal to settle cases.[120] However, Judge Posner also

111. *Id.*
112. *Id.*
113. *Id.* at 653.
114. *Id.*
115. *Id.* at 656.
116. *Id.* at 657 (Posner, J., dissenting).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

recognized that "*die Not bricht Eisen* ['necessity breaks iron']," finding "a potentially useful tool for effecting settlement, even if there is some difficulty in finding a legal basis for the tool," should not be easily discarded, especially when trial judges face "heavy" workloads.[121] Judge Posner did not further explore the contours of the 1983 version of Rule 16 as he found that, whatever it—or any inherent power—permitted, the order directed against Joseph Oat was impermissible, as the presence of a Joseph Oat corporate representative would not foreseeably prompt settlement since Oat had made it clear it would not agree to pay any money.

In dissent, Judge Coffey was even more cautious about inherent power. He was "convinced that Rule 16 does not authorize a trial judge to require a represented party litigant to attend a pretrial conference together with his or her attorney because the rule *mandates in clear and unambiguous terms that only an unrepresented party litigant and attorneys may be ordered to appear.*"[122] While judges do possess some degree of inherent authority, "this authority is limited."[123] Judge Coffey said that if we wish to recognize more expansive power, "let it be accomplished through the accepted channels of the Supreme Court and Congress of the United States."[124]

Judge Coffey outlined a "host of problems" that accompany too broad a recognition of inherent power. Many concern the rights of litigants. One involves the use of inherent power "to substitute for the subpoena power at pretrial conferences," raising "a due process question" because a subpoena is subject to a motion to quash and an exercise of inherent power is not.[125] More generally, Judge Coffey found that the recognition of broad inherent power already "has posed and will continue to pose a substantial invitation for judicial abuse."[126] He feared that the use of inherent power to compel represented parties to talk settlement would undermine the appearance of impartiality and propriety and cause litigants confusion and dismay over judicial participation.[127] Finally, he said that "to permit judicial officers . . . to exercise their personal judgment to require the attendance at pretrial conferences of enti-

121. *Id.*
122. *Id.* at 658 (Coffey, J., dissenting).
123. *Id.*
124. *Id.* at 663.
125. *Id.* at 660.
126. *Id.* at 661.
127. *Id.* at 662.

ties other than those specifically enumerated in Rule 16, upsets the delicate balance the Supreme Court and Congress struck between the needs for judicial efficiency and the rights of the individual litigant."[128]

In his dissent, Judge Ripple found "that the most enduring—and dangerous—impact" of the Kanne opinion was to upset the relationship between Congress and the Judiciary.[129] He said that because the Rules Enabling Act[130] was "designed to foster a uniform system of procedure throughout the federal system,"[131] it "hardly contemplates the broad, amorphous, definition" of inherent power rendered by Judge Kanne.[132] He concluded that "Congressional concern for uniformity of practice in the federal courts" will be damaged and that each individual court will be encouraged "to march to its own drummer."[133]

In his dissent, Judge Manion echoed the views of other dissenters. He reiterated that "judicial high-handedness" will be encouraged, additional expense to litigants will be incurred, and damage will ensue to the "appearance of fairness" in the trial courts.[134] He opined that inherent power cannot be "a license for federal courts to do whatever seems necessary to move a case along"; it should only be employed "to fill gaps left by statute or rule."[135] Thus, "where a statute or rule specifically addresses a particular area, it is inappropriate to invoke inherent power to exceed the bounds the statute or rule sets."[136]

C. Stretching the Written Laws

In contrast to the *Heileman* dissents, another appellate court, in *In re Novak*,[137] seemed receptive to stretching the 1983 version of Rule 16 to find that certain parties with attorneys could be ordered personally to attend pretrial settlement conferences.[138] The court explained that in two circumstances problems arise at settlement conferences attended only by attorneys. The first is when the otherwise represented party re-

128. *Id.* at 662–63.
129. *Id.* at 665 (Ripple, J., dissenting).
130. 28 U.S.C. § 2072 (1994).
131. *Heileman*, 871 F.2d at 665 (Ripple, J., dissenting).
132. *Id.*
133. *Id.* at 666.
134. *Id.* at 670 (Manion, J., dissenting). He does not mention Judge Ripple's fear that there will be a move away from uniformity or Judge Coffey's due process concerns.
135. *Id.* at 666. By contrast, Judge Posner would "hesitate to infer inadvertent prohibitions" by federal rulemakers on powers necessary for trial courts to function successfully. *Id.* at 657 (Posner, J., dissenting).
136. *Id.* at 666 (Manion, J., dissenting).
137. 932 F.2d 1397 (11th Cir. 1991).
138. *Id.* at 1407 n.19 (finding that "there is a colorable argument").

fuses to delegate to the attorney full settlement authority.[139] The second is when a nonparty insurer who is in charge refuses to delegate settlement authority to either the named party or its attorney.[140] In these situations, the "pretrial conference participant's ability to discuss settlement is impaired, and the value of the conference may be limited."[141] Thus, while Rule 16 does not expressly allow attendance orders "directed at represented parties or nonparty insurers,"[142] the court found that such orders were nevertheless available under Rule 16.[143] Judicial authority was found in two sources. One was the inherent power of the court;[144] the other involved an interpretation of Rule 16.[145] Beyond inherent power, the court found that "a party who refuses to give full settlement authority to his attorney and who retains control over settlement negotiations is, in fact, his own attorney for settlement purposes."[146] Because that party is then an unrepresented party for settlement purposes, the 1983 version of Rule 16, as interpreted, could permit the court to compel the party's attendance at settlement discussions.[147] If a nonparty insurer is in charge, the insurer's attendance can be accomplished through an order directed at the insured;[148] at least, this is true in a case such as *Novak*, where an employee of the defendant's insurer, Roger Novak, had the authority to make settlement decisions and the interests of the insurer and the insured are "aligned."[149]

139. *Id.* at 1405–06. Such a refusal is not blameworthy and is actually promoted by attorney conduct standards. On such delegations see Jeffrey A. Parness & Austin W. Bartlett, *Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority*, 78 OR. L. REV. 1061 (1999).

140. *Novak*, 932 F.2d at 1405–06. The court ultimately holds that it is this situation which is before it and finds that the court is "unauthorized, by statute, rule, or its inherent power, to order Novak, an employee of the defendants' insurer, to appear before it to facilitate settlement discussions." *Id.* at 1409.

141. *Id.* at 1406.

142. *Id.*

143. *Id.* at 1408.

144. *Id.* at 1406–07 & n.18 (citing G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989) (en banc)).

145. *See id.* at 1407 n.19 (construing the Federal Rules of Civil Procedure liberally).

146. *Id.*

147. *See id.* ("[T]here is a colorable argument that Rule 16, on its face, empowers the court to order such a party to attend a pretrial settlement conference; the party is an unrepresented party with respect to settlement, and, thus, his attendance is crucial.").

148. *Id.* at 1408.

149. *Id.* at 1408 & n.20.

D. Abuses of Authority

Of course, discretion in the exercise of judicial authority in pretrial conferencing should not be abused. Certain general guidelines on such discretion can be gleaned from a few of the opinions in *Heileman*, including concerns about "ignor[ing] the value of other people's time";[150] undermining the appearance of impartiality and propriety;[151] and, "the expense and imposition on litigants."[152] In *Heileman*, these concerns, of course, involved judicial authority over settlement rather than trial preparation conferences. The potential for judicial abuse seems greater with settlement conferences, especially "at a time of heavy, and growing, federal judicial caseloads."[153]

In *Heileman* there were also findings in some opinions that any assumed judicial authority to schedule settlement conferences requiring attendance by represented parties was employed abusively against Joseph Oat. Here, too, guidelines appear. Judge Posner found particular abuse because at the time of the order demanding an appearance by a Joseph Oat official with "full settlement authority," Joseph Oat "had made clear that it was not prepared to settle the case on any terms that required it to pay money."[154] For Judge Posner, the abuse of Joseph Oat was compounded because "no one officer of Oat may have had authority to settle" and thus "compliance with the demand might have required Oat to ship its entire board of directors" to the conference.[155]

E. Confusion Illustrated

Given the differing views and concerns in *Heileman* and *Novak*, it would not be surprising if confusion arose about the parameters of Federal Rule of Civil Procedure 16, its state law counterparts, and unwritten inherent judicial authority in settlement and trial preparation conferencing.[156] Confusion would be less likely if written pretrial con-

150. G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 657 (7th Cir. 1989) (en banc) (Posner, J., dissenting).

151. *Id.* at 662 (Coffey, J., dissenting).

152. *Id.* at 670 (Manion, J., dissenting).

153. *Id.* at 657 (Posner, J., dissenting).

154. *Id.* at 658. Judge Posner characterized the demand as "arbitrary, unreasonable, willful, and indeed petulant," *id.*, a view shared by Judge Manion, *id.* at 670 (Manion, J., dissenting).

155. *Id.* at 658 (Posner, J., dissenting).

156. *See, e.g.*, 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 16.04[1][a] (3d ed. 2000) wherein Magistrate Judge Wayne Brazil says this about Rule 16:

> The huge range of practices under Rule 16 among sitting federal judges is one of the more unnerving facts of litigation life that confronts the contemporary lawyer. Because

ference laws, such as Rule 16, were reformulated. Until changes are made, troubling cases will likely continue.

Pratt v. Philbrook[157] is one such troubling case, with a rather bizarre outcome that likely would have been avoided if a more comprehensive pretrial conferencing authority were expressly recognized. *Pratt* involved a two-vehicle accident causing Mary, a passenger in her sister Rita's car, to sue Kelley, the driver of a pick-up truck, in a federal district court.[158] Kelley was represented by counsel provided by his insurer, General Accident.[159] A settlement conference was held at which attorneys for Mary, Rita, and Kelley were present, as was a claims adjuster for General Accident.[160] Plymouth Rock, Rita's insurer, which had a subrogated claim for $5000 against Kelley because Rita had already received money from it for damage to her car, was not present.[161] The lien held by Plymouth Rock "was not explicitly mentioned during the conference," though "[a]ll counsel knew" about it.[162] The settlement conference led to an agreement by General Accident to pay the $100,000 policy limit,[163] with the counsel for Mary and Rita "assur[ing] the court that there would be no problem negotiating the division of the $100,000 between their clients."[164] The conference led to a dismissal without

---

> this range can be so great, even within the same district court, counsel must take special care to ascertain the specific rules and expectations of each district judge and magistrate judge to whom their cases are assigned. . . .
>
> Although the Federal Rules of Civil Procedure generally promote some commonality of practice between different judges and between different federal courts, so much flexibility has been built into Rule 16 that the Rule itself does relatively little to advance the cause of uniformity. In fact, Rule 16, perhaps more clearly than any other rule, reflects an express rejection of the notion that one procedural size fits all cases. To equip judges to fashion case development plans that are tailored to the needs to individual cases, the Rule necessarily confers a great deal of discretion on the individual judges who apply it. In addition, Rule 16 recognizes the authority of district courts, by local rule, to create specialized sets of procedures for various categories of actions. Responding to this invitation, many courts have adopted elaborate sets of specialized provisions that apply only to certain kinds of cases.

Id. (citation omitted).

157. 38 F. Supp. 2d 63 (D. Mass. 1999).

158. *Id.* at 65.

159. *Id.*

160. *Id.*

161. *Id.* at 65–66.

162. *Id.* at 66 (quoting Pratt v. Philbrook, 174 F.R.D. 230, 232 (D. Mass. 1997)).

163. *Id.*

164. *Id.* At least counsel for Rita may have owed duties to Rita's insurer in negotiating and implementing any division. *Compare* Greenwood Mills, Inc. v. Burris, 130 F. Supp. 2d 949, 960 (M.D. Tenn. 2001) (finding under Tennessee law that "[i]f a beneficiary's lawyer knows that his client's insurer is subrogated to his client's claim to the extent of benefits paid, and the lawyer plays 'a part in attempting' to prevent his client's insurer from collecting the amount due it under the in-

prejudice, subject to a reopening within sixty days if a "settlement is not consummated by the parties."[165] The agreement fell apart because there was no arrangement for payment of the subrogated claim.[166] The sixty days passed, however, and the case was pronounced dead.[167] Thereafter, Mary's counsel asked the court to vacate the dismissal.[168] This request was denied.[169] The denial was appealed, leading to a remand.[170] The case finally ended when the appellate court affirmed a denial of the motion to vacate.[171] Thereafter, Mary sued Kelley in a new federal court lawsuit for wrongfully repudiating the settlement agreement, prompting a counterclaim for abuse of process.[172] Mary lost on her claim.[173]

The trial judge in the first case clearly recognized that he had the authority to preside over a settlement conference attended by interested nonparties.[174] Present at the settlement conference were Rita's attorney (who had been ordered to attend) as well as a claims adjuster working with Kelley, who may not have been an agent of Kelley depending upon the alignment of interests between Kelley and his insurer, General Accident.[175] But that trial judge did not ensure (or perhaps even request) the attendance of all interested nonparties.[176] Thus, Plymouth Rock, an insurer holding a lien on any insurance proceeds benefitting Rita, was absent though its interest was known to all named parties and their counsel, as well as to Rita and to Kelley's insurer. This absence seems to have caused General Accident to refuse to pay the $100,000 because any such payment might not release General Accident from any liability to

---

sured's agreement with the insurer, the lawyer will not escape liability") (citing Aetna Cas. & Sur. Co. v. Gilreath, 625 S.W.2d 269, 274 (Tenn. 1981)), *with* Great-West Life & Annuity Ins. Co. v. Hofmann, No. 01-C-2470, 2001 WL 914469, at *2 (N.D. Ill. Aug. 13, 2001) (declining to follow *Greenwood Mills* in an ERISA case, but noting that supplemental jurisdiction should be exercised over related state law claims).

165. *Pratt*, 38 F. Supp. 2d at 66 (quoting *Pratt*, 174 F.R.D. at 233).

166. *Id.* The sisters had agreed on a 85%-15% split, with the bulk going to plaintiff. *Id.* However, the $5000 subrogated claim became a "sticking point" in the finalization of the settlement. *Id.*

167. *Id.* The court explained the sixty-day order of dismissal "means that the case falls off—is disposed of for purposes of my record but remains in limbo for sixty days and can be hauled back to life again if there are any problems wrapping up the case." *Id.* (quoting *Pratt*, 174 F.R.D. at 233).

168. *See id.* (noting that Mary's counsel wrote the court asking for a trial date because settlement was not reached and that the court treated his request as a motion to vacate the dismissal).

169. *Id.*

170. *Id.*

171. *Id.* at 66–67.

172. *Id.* at 65, 70.

173. *Id.* at 70.

174. Pratt v. Philbrook, 174 F.R.D. 230, 232 (D. Mass. 1997). Though Rita was not a named party, her attorney was present at a settlement conference. *Id.*

175. *Id.*; *see also In re* Novak, 932 F.2d 1397, 1408 (11th Cir. 1991) (noting that the interests of an insured and an insurer are "aligned" when there is no dispute over insurance policy coverage).

176. *Pratt*, 174 F.R.D. at 232. Though Plymouth Rock was a nonparty with a lien, it did not attend the conference. *Id.*

Plymouth Rock.[177] A written pretrial conference law recognizing the varying ancillary and inherent powers available under *Kokkonen* easily could have altered the unfortunate approach in *Pratt*, which neglected the interests of Plymouth Rock. As with Rita's claim against Kelley, the claim of Plymouth Rock against the policy proceeds held by General Accident may not have been triable on the merits in a federal district court. Yet, as in *Matsushita*, it nevertheless could have been included in the settlement as it was a factually-related (if not "factually interedependent") ancillary claim to Mary's claim against Kelley. Alternatively, it could have been triable, as was the law firm's claim against Bilzerian in *Cluett*, perhaps pursuant to the inherent powers necessary for successful court functioning.

IV. REFORMULATED PRETRIAL CONFERENCE LAWS

Confusion over the breadth of judicial authority in pretrial conferencing would dissipate considerably if there were more particular written civil procedure laws. Inquiries into the relationships between written laws and any ancillary or inherent power, as well as into the elasticity of the written laws themselves, would become unnecessary, or at least less difficult, if written civil procedure laws explicitly addressed judicial pretrial conferencing authority over unpresented claims and interests and over nonparties.

Consider, for example, how the *Novak* decision would have been approached if the proposal eliminated from the 1993 version of Federal Rule 16 had been in place. It simply declared that a "court may require that parties, or their representatives or insurers, attend a conference to consider possibilities of settlement."[178] Such a rule would have allowed the court to compel directly the attendance of senior insurance analyst Roger Novak, thus eliminating the need for the court to consider em-

177. The U.S. Court of Appeals stated the general rule in *Allstate Insurance Co. v. Mazzola*, 175 F.3d 255 (2d Cir. 1999):

> Where a third party tortfeasor obtains a release from an insured with knowledge that the latter has already been indemnified by the insurer or with information that, reasonably pursued, should give him knowledge of the existence of the insurer's subrogation rights, such release does not bar the insurer's right of subrogation. "The authorities are in agreement that a release given to a tort-feasor who has knowledge of the insurer's rights will not preclude the insurer from enforcing its right of subrogation against the wrongdoer." Otherwise, a release would operate as a fraud upon the insurer.

Id. at 260–61 (citations & footnote omitted) (quoting Silinsky v. State-Wide Ins. Co., 289 N.Y.S.2d 541, 545 (App. Div. 1968)).

178. *Proposed Rules*, *supra* note 40, 137 F.R.D. at 85.

ploying an order against a party to get to its nonparty insurer's agent and thus authorizing the order whether or not the defendant/insured and the nonparty insurer's interests were "aligned."[179] Such a written rule is already in place in Ohio, originating in 1993.[180]

Today, some local federal district court rules also expressly permit settlement conference attendance orders directly against insurers. For example, Local Civil Rule 16.1(c) in the U.S. District Court for the Eastern District of Michigan says: "Furthermore, at all conferences designated as settlement conferences, all parties shall be present, including, in the case of a party represented by an insurer, a claim representative with authority adequate for responsible and effective participation in the conference."[181] And, Local Civil Rule 16.8 in the U.S. District Court for the Western District of Michigan says: "In cases where an insured party does not have full settlement authority, an official of the insurer with authority to negotiate a settlement may be required to attend."[182] Arguably, such rules do prompt the undermining of "Congressional concern for uniformity of practice in the federal courts" feared by some judges in *Heileman*.[183]

Beyond insurers, other nonparties may be quite important in facilitating settlement. Such nonparties might be compelled, or at the very least invited, to attend settlement conferences. Such nonparties were, or were likely, present at pretrial conferences in some of the earlier discussed cases. First, an attorney who has been fired, substituted, or dismissed from a civil action and thus who no longer represents a party in the action may have a fee dispute with the former client who remains a named party in the action.[184] Thus, in *Cluett*, Bilzerian had a fee dispute with Latham and Watkins.[185] Had the applicable pretrial conference law

179. *In re* Novak, 932 F.2d 1397, 1408 & n.20 (11th Cir. 1991). Where their interests are not aligned, as where the insurer denies insurance coverage sought by the insured, the presence of both the insurer and the insured can prompt a settlement of the coverage issue, which may then prompt a settlement of the claim presented by the injured party against the insured wrongdoer.

180. OHIO R. CIV. P. 16. According to the Staff Note accompanying the 1993 amendment, the new provision was "meant to be declarative of existing practice and to work no substantive change in the powers of the court or in the obligations of parties or their attorneys or representatives." *Id.* staff note. The Note cited *Repp v. Horton*, 335 N.E.2d 722 (Ohio Ct. App. 1974), as well as several local rules of common pleas courts. OHIO R. CIV. P. 16 staff note.

181. E.D. MICH. LOCAL R. 16.1(c).

182. W.D. MICH. LOCAL R. 16.8.

183. *E.g.*, G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 666 (7th Cir. 1989) (en banc) (Ripple, J., dissenting).

184. Such attorneys also may have had contingency fee arrangements. *See, e.g.*, Galanis v. Lyons & Truitt, 715 N.E.2d 858, 863 (Ind. 1999) (finding that a successor contingency fee attorney has an obligation to pay an earlier contingency fee attorney out of the successor's contingency fee, if liability for the earlier fees is not explicitly contracted away).

185. Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251, 252–53 (2d Cir. 1988).

expressly allowed the trial court to compel the attendance of the law firm, or at least to invite its presence and to recognize its participatory rights if it attended, Bilzerian's argument that there was no ancillary jurisdiction would have been far less appealing. Second, a named class representative in a state or federal class action may be very interested in related civil actions, perhaps involving similar classes with different named representatives. In *Matsushita*, there were pending at the time of settlement both a state court class action in Delaware and a federal court class action in California.[186] Had the Delaware court possessed and exercised the express authority to compel the attendance of the California class representatives, those representatives would have been less likely to urge later that the Delaware case settlement should not apply to them. Third, interested nonparties include persons who could join or could be joined in a pending civil action. In *Pratt*, Rita's attorney was present at the settlement conference although Rita was not a named party.[187] Seemingly, the settlement was reached only because both sisters were present through their attorney-agents, though the settlement was never enforced because a lienholder with an interest in one of the sister's settlement proceeds was absent.

Written pretrial conference laws compelling attendance of interested persons and entities beyond parties, attorneys, and insurers already appear in some jurisdictions. Michigan Court Rule 2.401(F) states, in a section entitled "Presence of Parties at Conference":

> In the case of a conference at which meaningful discussion of settlement is anticipated, the court may direct that persons with authority to settle the case, including the parties to the action, agents of parties, representatives of lien holders, or representatives of insurance carriers:
>
> (1) be present at the conference; or
>
> (2) be immediately available at the time of the conference. The court's order may specify whether the availability is to be in person or by telephone.[188]

The identity of interested persons and entities can be facilitated by laws like Local Civil Rule 3.1(f) of the U.S. District Court for the Northern District of Texas, which provides that when a complaint is filed, it must be accompanied by "a separately signed certificate of interested persons

186. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 370 (1996).
187. Pratt v. Philbrook, 38 F. Supp. 2d 63, 65 (D. Mass. 1999).
188. MICH. CT. R. 2.401(F).

that contains a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities who or which are financially interested in the outcome of the case."[189] Local Civil Rule 7.4 provides that the "responsive pleading" must also be accompanied by a similar certificate.[190]

Together, the Michigan and Texas laws do not embody fully the judicial authority necessary for trial courts to prompt attendance of nonparties at pretrial conferences. And neither speaks to individual rights when such authority is employed or to guidelines on how expanded judicial pretrial conferencing authority should be employed.[191]

New written civil procedure laws should contain the broad language of Local Texas Rule 3.1 with the clear purpose of the Michigan court rule.[192] These new laws should allow trial court judges not only to compel the attendance of certain persons necessary for just, speedy, and inexpensive resolution, but also to extend invitations to other persons whose presence would be helpful but could not be mandated.[193] By expressly allowing invitations to certain nonparties, trial courts could better strike appropriate balances between individual rights and the needs of judicial administration. Rita, the sister in *Pratt*, is the type of nonparty who the court might only invite. The *Matsushita*[194] and *Cluett*[195] cases illustrate types of nonparties who might be compelled to attend pretrial conferences, for both the absent class members in *Matsushita* and the law firm in *Cluett* appear to have been subject to trial court compulsion. Distinctions between compelled and invited attendees are illustrated in the new Maine Civil Procedure Rule 16B(f), effective January 1, 2002,

189. N.D. TEX. LOCAL R. 3.1(f). If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. *Id.*; *see also* N.J.R. CIV. P. 4:5-1(b) (stating that initial pleadings should include names of any nonparties who are subject to joinder due to potential liability to any party).

190. N.D. TEX. LOCAL R. 7.4.

191. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 662–63 (7th Cir. 1989) (en banc) (Coffey, J., dissenting) (stating that a judge's actions must conform to the balance the Supreme Court and Congress reached between "the needs for judicial efficiency and the rights of the individual litigant").

192. The primary goal behind Rule 3.1 seemingly was to afford trial judges better insight into possible recusal grounds. *See, e.g.*, N.D. Cal. Gen. Order No. 48 (Feb. 22, 2000) (stating that the policy behind a new and similar certification standard involving interested entities or persons is to allow the court to "evaluate any need for disqualification or recusal early in the course of any case"); S.D.N.Y. LOCAL CIV. R. 1.9; E.D.N.Y. LOCAL CIV. R. 1.9.

193. Such a distinction helps insure that judicial power does not employ a broader inherent power as a substitute for the narrower subpoena power. *See, e.g.*, *Heileman*, 871 F.2d at 660 (Coffey, J., dissenting) (expressing concern that judges could use inherent power to expand the subpoena power improperly).

194. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

195. Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251 (2d Cir. 1988).

which says alternative dispute resolution conference "attendees shall include . . . [i]ndividual parties . . . [a] management employee or officer of a corporate party . . . [a]n adjuster for any insurance company providing coverage potentially applicable to the case . . . . Counsel for all parties; and . . . [n]onparties whose participation is essential to settlement discussions—including lienholders—may be requested to attend the conference."[196]

Besides addressing the types of participants, new written laws should provide guidance on how discretionary judicial authority in pretrial conferencing should be exercised.[197] Such laws would prompt more "uniformity of practice" and fewer marches to individual drummers.[198] Guidelines should include the proposition that when "authority to settle" is important, those commanded or invited to attend must be known to have such authority. In *Heileman*, a corporation was ordered to send a representative with settlement authority. Yet it was suggested that "no one officer . . . may have had authority to settle" and thus "compliance with the demand might have required [the corporation] to ship its entire board of directors."[199] Written guidelines should also include protections against undermining the appearance and reality of impartiality of trial court judges at any later trials;[200] recognize the differences between a pretrial settlement conference where there is and where there is not the need for later court approval of any settlement;[201] and promote re-

196. *See* Amendments to Maine Rules of Civil Procedure to Implement Alternative Dispute Resolution Procedures in Superior Ct., No. SJC-11 (effective Jan. 1, 2002) (amending ME. R. CIV. P. 16 and adopting ME. R. CIV. P. 16B).

197. There has been little guidance to date. The Advisory Committee stated in regard to the 1993 amendments to Rule 16:

> Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

1993 Rule, supra note 32, 146 F.R.D. at 605.

198. *Heileman*, 871 F.2d at 666 (Ripple, J., dissenting).

199. *Id.* at 658 (Posner, J., dissenting). Surprisingly perhaps, it is sometimes difficult for trial judges to learn who has authority to settle. Judicial inquiries can raise issues of privileged attorney-client communications (where delegation of authority from client to attorney may have occurred). *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 at 161 (1993) (stating that absent the client's consent, an attorney should not reveal to the trial judge any settlement authority limits or the advice of an attorney); *see also* Carver v. Condie, 169 F.3d 469, 473 (7th Cir. 1999) (finding that the settlement authority of the county sheriff on behalf of the county is unclear under Illinois law).

200. *See, e.g.*, C.D. ILL. LOCAL R. 16.1(B) ("The settlement conference in a matter to be tried to the court shall be conducted by a judge who will not preside at the trial of the case.").

201. *See, e.g.*, FED. R. CIV. P. 23(e) ("A class action shall not be . . . compromised without the approval of the court . . . ."); FLA. STAT. ANN. § 768.25 (West 1997) (requiring court approval of

spect for "the value of other people's time"[202] by encouraging distance participation (e.g., by phone).[203]

VI. CONCLUSION

The civil case box described in contemporary written civil procedure laws contains presented claims and named parties. Yet, civil litigation in American trial courts today frequently involves unpresented claims, as well as related interests (e.g., attorney fees) and nonparties (e.g., insurers and lienholders). Written laws are occasionally "enhanced" by ancillary and inherent power case precedents, but the continuing use of such precedents undermines a desired uniformity, undercuts the role of legislators and judges in court rulemaking, and promotes confusion. Written civil procedure laws on pretrial conferences geared to settlement or to trial preparation are particularly in need of reform. As in 1983 with the 1938 version of Rule 16, contemporary written pretrial conference laws are outdated. They should be reformulated to provide clarity[204] and to better reflect the contours of ancillary and inherent power recognized under the *Kokkonen* and the exercises of such authority in cases like *Matsushita* and *Cluett*.

settlements in certain Wrongful Death Act cases involving minors); 750 ILL. COMP. STAT. 5/502(b) (1999) (limiting the binding effect on trial courts of party agreements in marriage dissolution cases on child custody, support and visitation matters).

202. *Heileman*, 871 F.2d at 657 (Posner, J., dissenting).

203. *See, e.g.*, 42 U.S.C. § 1997e(f)(1) (Supp. V 1999) (stating that to the "extent practicable" in a prisoner civil rights case where "the prisoner's participation is required or permitted," proceedings "shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined").

204. In 1993, the Advisory Committee noted that the explicit expansion of those subject to pretrial conferencing authority would help "eliminate questions . . . regarding the authority of the court to make appropriate orders." *1993 Rule*, *supra* note 32, 146 F. R. D. at 603 advisory committee's note.